United States Court of Appeals

for the Second Circuit

REPLY BRIEF

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75-2457

United States Court of Appeals

For the Second Circuit.

B

B/S

SAMUEL H. SLOAN,

Petitioner,

-against-

SECURITIES & EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Orders of the Securities and Exchange Commission

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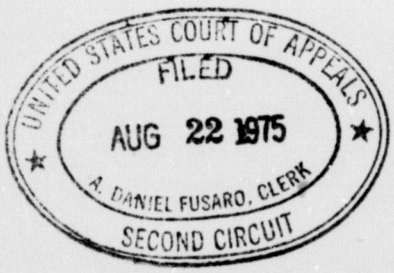
REPLY BRIEF FOR THE PETITIONER



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3

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Petitioner,

-against-

SECURITIES & EXCHANGE COMMISSION,
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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

POINT I

THE ISSUES PRESENTED BY THIS PETITION ARE NOT MOOT

In spite of the overwhelming case law to the contrary, the S.E.C. argues in its brief that the issues presented by this petition are moot. Although there is little to commend this argument, the fact that the S.E.C. would advance this argument is itself interesting. It should be observed that the S.E.C. advances the opposite argument whenever it brings an action for an injunction in a district court. In those cases, particularly where the S.E.C. sues a defunct broker dealer or a defunct corporation for violations of various S.E.C. rules, the S.E.C. invariably cites *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953) and other cases which the petitioner here cited in his brief.

The S.E.C.'s claim of mootness is foreclosed by *Roe v. Wade*, 410 U.S. 113, 125 (1973) which declared the Texas criminal abortion statutes to be unconstitutional. There the Supreme Court said:

> "[T]he normal 266 day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination

> makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage and appellate review will be effectively denied.—Pregnancy provides a classic justification for a conclusion of non-mootness."

In the case at the bar, the S.E.C. initially ordered the suspension of trading in CJV for 10 days and, as each order expired, ordered a new suspension of trading. It is clear that by contending that the expiration of each order renders the controversy moot, the S.E.C. demonstrates the true purpose in advancing this argument which is to defeat all judicial review of orders of suspension. This is constitutionally impermissible. As Chief Justice Marshall stated in his summation of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803):

> "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury, its proper redress."

The S.E.C. claims that this controversy is moot because the petitioner is not seeking review of an "active series of trading suspensions" (respondent's brief, p. 13). This argument is apparently based upon the fact that the S.E.C. suspended trading in CJV for successive 10-day periods from November 29, 1973 until January 26, 1975 (respondent's brief p. 4) and then initiated a new series of suspensions on April 29, 1975 which have continued to the present. It is the claim of the S.E.C. that the new "series" of suspensions is based upon different "facts" than the old series of suspensions and that therefore the claims which the petitioner is advancing are "hypothetical" (respondent's brief p. 13).

To begin with, the statement by the S.E.C. that the successive orders of suspensions from November 29, 1973 until January 26, 1975 constitutes a single "active series of trading suspensions" contains a tacit admission that the S.E.C. violated the Securities Exchange Act of 1934 ("Exchange Act") which provides that the S.E.C. may not suspend trading in a security for longer than ten days without the approval of the President. Furthermore, the "facts" upon which the S.E.C. bases its most recent series of suspensions are not known to or knowable by this court. As usual, the S.E.C. has never revealed publically why it continues to suspend trading in CJV. The current series of suspensions is

being continued by the S.E.C. every ten days without comment.

In pages 4-8 of the respondent's brief a series of unsupported statements are made concerning the "facts" upon which the S.E.C. based it's orders of suspension of trading in CJV. In footnote 5 of page 4 the S.E.C. states that the most recent suspension was "intended to permit dissemination of information concerning regulatory action against CJV by Canadian authorities." This statement is unsupported by evidence. For that matter, none of the documents offered by the S.E.C. which have been proffered by the S.E.C. as the "record" of this proceeding meet the "substantial evidence" standard set forth in §25 of the Exchange Act (15 U.S.C. 78y). Furthermore, it should be obvious that the Canadian authorities have had more than enough time from April 29, 1975 to the present date to disseminate any "information" they wanted to disseminate about CJV.[1]

There can be no question that the issues presented in this proceeding are not moot. This proceeding presents constitutional issues which are independent of the "facts" upon which the S.E.C. claims that the suspensions in question were based. Among other things, the petitioner seeks a declaration that all suspensions of trading are unconstitutional. That determination will not turn upon a series of unsigned memorandums which the S.E.C. proffers as proof that the particular suspensions in question were justified.

POINT II

THE PETITIONER POSSESSES STANDING TO SEEK REVIEW OF THE S.E.C.'S ORDERS OF SUSPENSION.

The Supreme Court in *Flast v. Cohen*, 392 U.S. 83, 99 (1968) described the element of standing as follows:

> "The 'gist of the standing question' is whether the party seeking relief has 'alleged such a personal stake in

1. In addition, the statement made by the S.E.C. is specious. Unlike the S.E.C., the Canadian authorities are not in the business of disseminating information. Rather, they put people in jail when they find the law has been violated.

the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question.' " *Baker v. Carr*, 369 U.S. 186, 204, (1962).

In practice, this rule has proved difficult to apply. In *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n 3 (1973) the Supreme Court quoted one commentator who said:

> "the past law of standing is so cluttered and confused that almost every proposition has some exception."

However, in this proceeding standing is obviously not a problem. The S.E.C. has harrassed Sloan with litigation and has proceeded against Sloan three times because of matters relating to trading suspensions. In *S.E.C. v. Sloan*, 71 Civil 2695, 369 F. Supp. 996 (1974) the court agreed with the S.E.C.'s action in deducting from Sloan's net capital $11,000 representing fails to deliver in Triex International Corp. a security which Sloan had sold short and failed to deliver and which the S.E.C. had suspended from trading. Because of this $11,000 deduction, the S.E.C. found Sloan to have a net capital deficiency of $4,383 instead of $6,617 in excess net capital. (See paragraph 29 of the district court's findings of fact.) In *S.E.C. v. Sloan*, 74 Civil 5729, U.S.C.A. docket no. 75-7056, the S.E.C. sued Sloan claiming that Sloan had submitted listing applications for Triex International Corp. and approximately 300 other securities which the S.E.C. had suspended from trading. *In the Matter of Samuel H. Sloan* (Adm. Pro. File No. 3-3680) U.S.C.A. docket No. 75-4087, the S.E.C. proceeded against Sloan and its final decision was apparently based upon the facts alleged in the two injunctive actions brought by the S.E.C. against Sloan. Sloan has also sued the S.E.C., 74 Civil 2792, for declaratory and injunctive relief declaring, among other things, that the statute authorizing the S.E.C. to suspend trading in a security to be unconstitutional. In the First Affirmative Defense of its answer the S.E.C. stated:

> 37. "This court is without jurisdiction of this action against the Commission and exclusive jurisdiction to review the Commission orders [of suspension] complained of herein is conferred upon the United States Court of Appeals."

Therefore, the S.E.C. has selected the Court of Appeals as the forum in which it wishes to be challenged and therefore the S.E.C. is estopped from asserting that the orders in question are not properly reviewable by this court.

It is difficult to imagine two parties more adverse than the S.E.C. and Sloan. Therefore, the "concrete adverseness" requirement is satisfied. Furthermore, by questioning Sloan's standing, the S.E.C. is really seeking to frustrate review of all orders of suspension of trading. In *Sierra Club v. Morton,* 405 U.S. 727, 740 (1972), a case relied upon by the S.E.C., the Supreme Court observed that the standing requirement "does not insulate executive action from judicial review nor does it prevent any public interest from being protected through the judicial process."

The S.E.C., by arguing that the issues are moot and that the petitioner lacks standing, is making a thinly veiled effort to frustrate all judicial review of orders of suspension of trading. Clearly, under the constitution, this attempt cannot be permitted to succeed.

The S.E.C. contends that Sloan was not a party to the proceeding before the S.E.C. (respondent's brief p. 15). If this is true, it is only because the proceeding before the S.E.C. was ex parte. It is submitted that by the pragmatic standard which measures the meaning of review statutes in this court, Sloan and all other stockholders of CJV were parties although they were not specifically named in the orders of suspension of trading. Brief of the Respondent in *S.E.C. v. Medical Committee for Human Rights* 30 L. Ed. 2d 900 (1972) cf. *Lewis v. NLRB,* 357 U.S. 10, 15-16 (1958). Furthermore, as the S.E.C. notes in its brief (p. 14, n. 14), the Exchange Act has recently been amended so that it is no longer necessary for one to have been a party to the agency proceeding in order to seek review in this court. It is well established that this court must apply the law which is in effect at the time it renders its decision. *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974).

The S.E.C. contends that Sloan has not been aggrieved by the order of the S.E.C. because he could have sold his stock during the three month period in which the S.E.C. permitted trading in CJV to resume (respondent's brief p. 12). The answer to this

argument can be found in *Youngstown Co. v. Sawyer*, 343 U.S. 579, 585 (1952) where the Supreme Court rejected the argument advanced by the government that Youngstown Co. had not been aggrieved by the President's order to sieze the steel mills. Moreover, in *Youngstown* the government was apparently willing to pay "just compensation" for the steel mills. The S.E.C. has made no such offer in this case. Although the two actions are not strictly comparable since the S.E.C. has not actually siezed Sloan's shares of CJV but rather has made it illegal for Sloan to exercize his property rights over these shares, there can be no doubt that what the S.E.C. has done has the same practical effect as a seizure. See *Societe Internationale v. Rogers*, 357 U.S. 197, 200-1 (1958) where the Swiss government "confiscated" certain records although this "confiscation" amounted to an interdiction of the transmission of the records to third persons. Although Sloan may be able to recover from the S.E.C. injury sustained as a result of the illegal suspensions of trading by the S.E.C., *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 701-2,[2] and a suit seeking such a recovery is now on appeal to this court in *Sloan v. S.E.C. et al.*, U.S.C.A. docket no. 75-7283, it is obvious that the effect of the trading suspensions are "bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement." *Youngstown, supra*, 343 U.S. at 585. The fact that Sloan happens to be the registered holder of 13 shares of CJV is almost fortuitous and would not provide an appropriate measure of damages. Had the S.E.C. not suspended trading in CJV Sloan might well have bought or sold short many thousands of shares of CJV, as he has done in the past. To require Sloan to sue the S.E.C. for money damages as the only appropriate remedy for the unlawful suspension of trading in CJV shares would put Sloan in the position of suing:

> "for intangible economic injury such as was of a non-contractural opportunity to buy or sell [and therefore Sloan would be] seeking a largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective hypothesis."

2. However, the S.E.C. has contended that it is immune from suit.

Blue Chip Stamps v. Manor Drug Stores —— U.S. ——, 44 L. Ed. 2d 539, 549 (1975).

In support of its argument that Sloan lacks standing to challenge the orders in question, the S.E.C. relies on *Independant Investor Protection League v. S.E.C.*, 495 F. 2d 311 (2d Cir. 1974); *Sierra Club v. Morton, supra* and *United States v. SCRAP*, 412 U.S. 669 (1973). However, reliance on these cases is inappropriate. In all cases, a private party was seeking to force the government to deprive third parties of the rights they would undeniably have were it not for the existence of a regulatory scheme. In *Sierra Club* injunctive relief was sought against the granting of approval or the issuance of permits for commercial exploritation of a valley which was adjacent to a national park. In *SCRAP* a group of law students decided that it would be a good idea to force the nations railroads to make use of recyclable goods and, in order to accomplish this purpose, instituted suit against the Interstate Commerce Commission seeking to enjoin the ICC from granting to the nation's railroads a 2.5 percent surcharge on nearly all freight rates until the railroads agreed to make use of recyclable goods. In *Independent Investor Protective League* a private party sought to prevent the S.E.C. from granting exemptions to various applicant companies under the Investment Companies Act of 1940.

In the case at the bar, Sloan is not seeking to force the S.E.C. to regulate others nor is he expressing an altruistic desire to insure the "protection of the public." In short, Sloan is not seeking to impose his own ideas of public policy on the S.E.C.. Rather, he is seeking to be relieved of the yoke of regulation which the S.E.C. has imposed upon him. Specifically, by suspending trading in shares of CJV, the S.E.C. has made it illegal for Sloan to buy and sell those shares.[3] According to papers filed in *S.E.C. v. Sloan*, 74 Civil 5729, Sloan, unless enjoined, will continue to submit listing applications for suspended securities and will continue to seek to trade in those securities. Thus, if the allegations made by the S.E.C. are to be believed, it is quite clear that Sloan has been aggrieved by the orders of suspension in question.

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3. And more recently, the S.E.C. has barred Sloan for life from being associated with any broker or dealer. *In the Matter of Samuel H. Sloan, supra.*

POINT III

THIS PETITION FOR REVIEW IS PROPERLY BEFORE THIS COURT.

In its brief, the S.E.C. advances a variety of technical arguments and concludes that, for the reasons given, this petition is not properly before this court. However, virtually identical arguments were advanced by the S.E.C. and rejected by the District of Columbia Circuit in *Medical Committee for Human Rights v. S.E.C.*, 482 F. 2d 659 (D.C. Cir. 1970) *dismissed as moot* 404 U.S. 403 (1972).

In its brief, the S.E.C. states that "Congress made no express provision for review of orders suspending trading." (brief p. 11). However, the S.E.C. does not contend that a suspension of trading is not an order, or that it is a non-reviewable order, although it does state that "court review of these orders was probably never contemplated by Congress."

There can be no doubt that a suspension of trading is a reviewable order within the meaning of the Administrative Procedure Act 5 U.S.C. 551(6). In *Chicago v. United States*, 396 U.S. 162, 166 (1969) the Supreme Court held that a decision by an administrative agency to terminate an investigation was a reviewable order. This was but one of a series of Supreme Court decisions which established a broad view of what constitutes a reviewable order. See *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), (promulgation of regulation by FDA); *Tooahnippah v. Hickel*, 397 U.S. 598 (1970) (disapproval of will); *Oestereich v. Selective Service System Board*, 393 U.S. 233 (1968) (revocation of draft exemption); *NBC v. United States*, 319 U.S. 190. A suspension of trading doubtless falls within that view and therefore an order of suspension of trading is subject to judicial review.

Apparently in recognition of the fact that judicial review is undoubtedly available in some court, the S.E.C. seeks to becloud the issue by stating that it is not clear whether review could be had in a court of appeals or in district court (respondent's brief p. 11). The answer to this question, which will undoubtedly be displeasing to the S.E.C., is that review is available in both courts. Although Congress, in passing §25 of

the Exchange Act, made direct review by this court available, it did not mean to preclude the traditional avenues of judicial review. *Abbott, supra* at 142. The reason Congress made direct review by the Court of Appeals available was to permit an appeal under a "substantial evidence" test rather than the "arbitrary and capricious" test available in the traditional injunctive suit. *Id.* at 143.

Nevertheless, the S.E.C. has apparently succeeded in convincing three district court judges that review may only be had only in the Court of Appeals. Judge Ward, in denying a motion to dismiss in *S.E.C. v. Sloan,* 71 Civil 2695, Judge Mac Mahon, in denying a motion to intervene in *S.E.C. v. Canadian Javelin Ltd.*, 73 Civil 5074 and Judge Griesa in dismissing the complaint in *Sloan v. S.E.C. et al* all expressed the view, directly or indirectly, that review of an agency proceeding may only be had directly in the Court of Appeals. All three of these decisions are on appeal to this court.

As noted previously, the S.E.C. argued in the district court that the Court of Appeals has exclusive jurisdiction to review orders of suspension of trading. Having made this argument in the district court, it is estopped from making a contrary argument here. In any event, the technical issues raised by the S.E.C. are of no moment. Under the Declaratory Judgment Act 28 U.S.C. 2201 this court has the authority to declare that the suspensions of trading in question were illegal or unconstitutional regardless of whether this controversy is presented in the form of a direct review of a determination by the S.E.C. or in the form of an appeal of a decision by the district court.

POINT IV

THE PETITIONER HAS NOT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES BECAUSE NO ADMINISTRATIVE REMEDIES EXIST.

One of the more specious claims advanced by the S.E.C. is that the petitioner has failed to exhaust his administrative remedies. However, nowhere in its brief does the S.E.C. state what that administrative remedy is. This ommission is not a

mere oversight. At oral argument before Judge Griesa in *Sloan v. S.E.C. et al, supra*, the court asked counsel for the S.E.C. what administrative remedies were available. To this question counsel for the S.E.C. replied: "I am not sure if we briefed that particular point, your honor." (Transcript of oral argument p. 21).

The obvious reason for which the S.E.C. did not brief that point there, nor does it brief that point here, is that there is no administrative remedy available. What the S.E.C. is actually doing is asking this court to create a new judge made remedy where one did not exist previously. It does this by urging this court to adopt the rule that "when suspensions of trading are renewed for additional ten-day periods after an initial summary suspension, persons showing a sufficient interest might well be entitled to a hearing and granted one after the initial suspension." (Respondent's brief p. 23).

This statement appears to be a concession in view of the fact that, in the history of the S.E.C., it has never conducted a public hearing regarding a suspension of trading. Actually, it is a grab for power. Congress has not given the S.E.C. the general power to conduct inquisitions whenever it feels the desire to do so. Under the Exchange Act, the S.E.C. may conduct a hearing on whether it should deny, suspend, or revoke the registration of a broker or dealer (§15(b)5), whether it should suspend, bar or censure a person from being associated with a broker or dealer (§15(b)7), whether it should suspend or revoke the registration of a national securities association (§15A(1)I), whether it should suspend or withdraw the registration of an exchange, (§19(a)1), a security (§19(a)2) or a member of an officer of an exchange (19(a)3), or whether it should alter or supplement the rules of an exchange (§19(b)). However, even with the recent amendments to the Exchange Act, the S.E.C. did not possess the authority to conduct a hearing as to whether trading in a security should be suspended.

"It is more than curious that the S.E.C. should seek to change the 1934 act by judicial action." *Blue Chip Stamps v. Manor Drug Stores* —— U.S. ——, 44 L. Ed. 2d 539, 563 (1975) (Powell, J., concurring). This is particularly curious since the premise upon which the S.E.C. bases its argument is untrue. The S.E.C.'s brief states (p. 16): "As far as we are aware, Mr. Sloan has never sought a hearing before the Commission, formal

or otherwise—." However, in a letter from Sloan to the S.E.C. dated August 10, 1973, Sloan stated:

> "The purpose of this letter is to make a formal complaint concerning trading activity in Canadian Javelin Ltd. ("CJV") and to request that the Commission suspend trading in this security. I also request that the Commission investigate and conduct hearings concerning its trading activity. The reasons for this request are as follows.—"

The S.E.C. never responded in writing to this letter.[4] In *Sloan v. S.E.C. et al.*, the complaint alleged that this and other letters had been mailed to the S.E.C. and that the S.E.C. had not responded in writing. In its answer (¶22, p. 8) the S.E.C. alleged:

> "The Commission admits that Sloan wrote letters to Larry Grimes, a staff attorney in the Commission's Division of Enforcement, with respect to Canadian Javelin and admits that these letters were not responded to in writing. The Commission states, however, that Mr. Grimes was in frequent contact with Mr. Sloan by telephone and states that Mr. Sloan's letters requesting a suspension of trading in Canadian Javelin securities were responded to by telephone."

Since the S.E.C. did not respond to Sloan's first request for a hearing concerning CJV, there was no reason for Sloan to make repeated requests.

The S.E.C.'s brief argues (p. 12) that Sloan did not request relief from its orders of suspension from the S.E.C.. However, relief from the S.E.C.'s orders of suspension would have been beyond the power of the S.E.C. to grant. It should be observed that Sloan contends that the actions of the S.E.C. in suspending trading in CJV were illegal. In rejecting an argument similar to that advanced by the S.E.C., Mr. Justice Whittaker stated:

> "It is obvious that, after the illegal or oppressive subpoena has been enforced, the Board on its review of

4. This letter can be found in the appendix of the appeal of *S.E.C. v. Canadian Javelin Ltd.*, U.S.C.A. docket no. 75-7046 (p. 86) and in the appendix to the appeal in *Sloan v. Canadian Javelin Ltd.* 75-7096 (p. A-212).

the completed record can no more relieve the consummated oppression than it can unring a bell." *NLRB v. Duval Jewelry Co.*, 357 U.S. 1, 9 (1958) (concurring opinion).

By the same logic, an administrative hearing, were it available, would not relieve an aggrieved person from the injury occasioned by the suspension of trading. Moreover, the S.E.C. could, and in all probability would, delay the administrative hearing until after the suspension of trading had terminated and then decide that the matter had become moot. For example, in *Koss v. S.E.C.*, 364 F. Supp. 1321 (S.D.N.Y. 1973) Judge Bauman observed that the S.E.C. had displayed much foot-dragging in connection with its own administrative proceeding and ultimately in that case the administrative hearing was not held until more than two years after the administrative proceeding had been instituted. Similarly, *In the Matter of Samuel H. Sloan, supra,* it took the S.E.C. more than three years, from April 24, 1972 until April 28, 1975, to conclude its administrative proceeding against Sloan. It can only be presumed that the S.E.C. would dally even longer in deciding an administrative proceeding instituted at the request of an outsider than it would in deciding an administrative proceeding instituted by the S.E.C. staff.

Furthermore, the brief of the respondent (p. 23) confuses an administrative hearing with a judicial hearing. A judicial hearing is, by definition, held before a judge in an authorized tribunal. However, an administrative hearing is held before an "administrative law judge" who is really not a judge but rather, in the case of the S.E.C., is an S.E.C. employee who, in practice, is promoted to the position of administrative law judge as a reward for many years of dedicated service as a member of the S.E.C. staff. It is obvious that an S.E.C. administrative law judge is not a federal judge in the constitutional sense. Under Article III, Section 1 of the Constitution, a federal judge receives a lifetime appointment. The only leverage that can be asserted against a federal judge is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a jury. *Chandler v. Judicial Council,* 398 U.S. 74, 136 (1970) (Douglas, J., dissenting). In contrast an administrative law judge is an employee of the administrative agency where he works and can be hired and fired in the same manner as any

other federal employee.

In addition, neither an administrative law judge nor an administrative agency has the power to decide a case or controversy. Justice Holmes in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) defined a "judicial inquiry" as one that "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist" as contrasted to legislation, which "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." In *Chandler, supra*, a conclusion was reached that administrative action was legislative rather than judicial in character. Thus an administrative remedy, if it existed by statute, would not exist in fact since neither an administrative law judge nor the S.E.C. itself would have the power to remedy a past wrong.

There can be no question that under *Prentis* the orders of an administrative agency are legislative rather than judicial in character. Therefore, a requirement that an aggrieved person, prior to seeking judicial relief, must apply to the S.E.C. for relief from its own order would be equivalent to a requirement that one must apply to Congress for the repeal of an Act of Congress prior to asserting the unconstitutionality of that Act in a court of law. In the case at the bar the S.E.C. has made it illegal for persons to buy and sell shares of CJV. Clearly, this act is legislative rather than judicial in character. An application to the S.E.C. itself from relief from its orders of suspension of trading would be futile. Moreover, if such an application raised all of the issues presented in this proceeding, the petitioner would, in effect, be seeking from the S.E.C. an admission of the illegality of its own prior conduct. *Ricci v. Chicago Merchantile Exchange*, 409 U.S. 289, 309 (1973) (Douglas, J., dissenting). In addition, this course would trap the petitioner into seeking a binding adjudication from a body which he contends is unconstitutionally constituted and that body could spend the next several years making up its mind while, in the meantime, the exhaustion doctrine would truely apply. Consequently, the argument that the petitioner has failed to exhaust his administrative remedies and is presenting constitutional questions to this court prematurely is without merit. *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958). *Radio Corporation of America v. United States*, 358 U.S. 334, 346 (1959); cf. *United States v. Western Pacific R. Co.*, 352 U.S. 59, 63, 64 (1956).

POINT V

THE PETITIONER HAS SATISFIED THE REQUIREMENTS OF §25 OF THE EXCHANGE ACT.

The only jurisdictional argument advanced by the S.E.C. which has a surface appeal is the argument that the petitioner has not satisfied the requirement of §25 that all objections raised shall first "have been urged before the Commission." However, according to the brief of the respondent (p. 16, n. 16) Section 25 has been amended to include the words "or [unless') there was reasonable ground for failure to do so." As noted previously, under *Bradley v. Richmond School Board, supra,* this court must apply the statute in effect at the time it renders its decision, not the one that was in effect when the petition for review was filed.

In any event, the views expressed by the petitioner in his main brief have all been urged before the Commission on prior occasions. In particular, the constitutional arguments which the petitioner is advancing affirmatively here were interposed as a defense, *In the Matter of Samuel H. Sloan, supra,* the administrative proceeding where the S.E.C. sought to revoke Sloan's broker dealer registration. There in its final decision, the S.E.C. stated (p. 6, n. 23):

> "Respondent argues that the text of the Exchange Act is of no moment because the whole thing is unconstitutional. It is not for us to pass on that. Having been instructed by Congress to administer the Act, we are constrained to assume that the statute is valid unless and until the courts hold otherwise. See *Milton J. Wallace,* Securities Exchange Act Release No. 11252 (February 14, 1975), 6 S.E.C. Docket 300, 301; *Mutual Fund Distributors, Inc.,* 41 S.E.C. 174, 181 (1962); *Walston & Co.,* 5 S.E.C. 112, 113 (1939).[5]

From this decision it is apparent that the argument advanced by the S.E.C. (respondent's brief p. 17) that the petitioner must first submit his constitutional arguments to the S.E.C. is

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5. More of this decision is quoted on p. 24 of the brief of the petitioner.

specious and is advanced for the sole purpose of frustrating all judicial review of orders of suspension. In addition, since the same questions of law have already been decided by the S.E.C. in another proceeding, judicial review of the instant proceeding may be had without the necessity of re-submitting these same questions to the S.E.C. *A. J. Phillips Co. v. Grand Truck W. R. Co.*, 236 U.S. 662; *Crancer v. Lowden*, 315 U.S. 631.

Furthermore, Sloan "urged his objections before the Commission" by suing the S.E.C. in the district court for declaratory relief declaring the power of the S.E.C. to suspend trading in a security to be unconstitutional. Again, the constitutional arguments which are presented here were presented to the district court in that suit. Under the pragmatic test, which is the only test that this court can apply, a suit against the S.E.C. by the petitioner had the effect of urging the petitioners views before the Commission.

As noted previously, §25 has been amended so that arguments need not be advanced before the S.E.C. in the first instance when there is "reasonable ground for failure to do so." Since a suspension of trading involves summary action by the S.E.C., as a matter of equity a party aggrieved by such action should be permitted to invoke the jurisdiction of the courts immediately. It is submitted that the need for immediate judicial relief in such cases provides a "reasonable ground" for a failure to apply to the S.E.C. for such relief.

One of the rationale for the principle that a matter should be submitted for an initial determination by an administrative agency is that the courts should have the benefit of the agency's resolution of factual issues within the agency's expertise. *Ricci, supra.* However, the case at the bar is not likely to turn on factual issues since under §25 this court does not have the authority to make findings of fact. Moreover, the views of the S.E.C. are no longer entitled to any special weight. *United Housing Foundation, Inc. v. Forman* —— U.S. ——, 44 L. Ed. 2d 621, 635 n. 24 (1975). The case at the bar provides an excellent example of the reason for this since on pp. 13-17 of the respondent's brief the S.E.C. advances arguments which are specious, frivolous and directly contrary to arguments advanced by the S.E.C. in other litigation involving the petitioner.

As the Supreme Court said in *Berger v. United States*, 295 U.S. 78, 88 (1931)

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligations to govern impartially is as compelling as its obligation to govern at all; and whose interests, . . . is not that it shall win a case but that justice shall be done."

In the case at the bar, the S.E.C. argued in the district court that the court of appeals has "exclusive jurisdiction" to review orders of suspension of trading. But, now that the matter has been presented to the Court of Appeals, S.E.C. argues, in effect, that this court does not have jurisdiction either. It is submitted that the transparent nature of this argument is evident.

Moreover, in *Oestereich v. Selective Service Board, supra,* 393 U.S. at 242, the Supreme Court said:

> "A challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity, but also presents an issue beyond the competence of the [administrative agency] to hear and determine. Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. See *Public Utilities Comm'n v. United States,* 355 U.S. 534, 539 (1958); *Engineers Public Service Co. v. S.E.C.,* 138 F. 2d 936, 952-953 (D.C. Cir. 1943), *dismissed as moot* 332 U.S. 788."

Since the petitioner is challenging the validity of the proceeding whereby the S.E.C. summarily suspends trading in securities, all of the procedural arguments advanced by the S.E.C. are irrelevant and this court must proceed to the merits of the controversy.

POINT VI

THE REMAINING ARGUMENTS ADVANCED BY THE RESPONDENT ARE WITHOUT MERIT.

The respondent's brief is divided into three main sections. Pages 3-7 are devoted to saying bad things about CJV. Pages 12-17 are devoted to explaining why this court should not decide the

issues presented. Only in pages 18-25 does the brief of the respondent deal with the merits.

One of the principal arguments advanced by the S.E.C. is that summary administrative action affecting property interests will be sustained in extraordinary situations where some valid governmental interest is at stake. However, the S.E.C. fails to explain how the summary suspension of trading in CJV was required by some valid governmental interest. Indeed, the brief of the S.E.C. admits (p. 6) that on November 29, 1973 there was no trading market in CJV because, from October 25, 1973 to that date, trading in CJV had been suspended by the American Stock Exchange.

None of the cases cited by the S.E.C. support the claim that there is a valid governmental interest involved in suspending trading in a security. For example, the most recent of the cases cited by the S.E.C., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), involved a Puerto Rico statute which provided for the seizure and forfeiture of vessels such as a pleasure yacht used to transport marijuana. The Supreme Court upheld the constitutionality of the statute and observed that the Supreme Court had established by prior decisions that "due process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food, from misbranded drugs, to aid the collection of taxes, or to aid the war effort." 465 U.S. at 697 (citations omitted). However, the interest of the government in establishing effective measures to enforce the drug laws or to prevent the distribution of contaminated food or misbranded vitamins cannot be equated with the supposed need of the government to interfere in an otherwise perfectly legal business transaction between a willing buyer and a willing seller neither of whom are involved in any wrongdoing and neither of whom are likely to be known or knowable to the government. Furthermore, all of the cases cited by the S.E.C. upheld judicial action where a hearing was available whereas, as has been shown previously, administrative action is legislative in character and, in the case at the bar, no hearing is available and the attempt by the S.E.C. to create a judge made rule to save the constitutionality of the statute has all the hallmarks of ex post facto legislation.

If Congress were to pass a law making it illegal to buy and sell

shares of CJV, such a law would doubtless be unconstitutional. Not only would such a law be unconstitutionally arbitrary but it would violate the Tenth Amendment to the Constitution by passing legislation in an area reserved to the States.[6] The Tenth Amendment discloses the widespread fear that the national government might, under pressure of a supposed general welfare, attempt to exercise powers which had not been granted. *Kansas v. Colorado*, 206 U.S. 46. It is submitted that there can be no doubt that Congress cannot by legislation prevent a willing buyer and a willing seller, both of whom are domiciled in the same state, from entering into a transaction involving the purchase or sale of CJV shares where none of the means or instrumentality of interstate commerce are involved.

It is clear that the S.E.C. intends that a trading suspension of shares of CJV will operate as an absolute ban on all purchases and sales of those shares. In the original complaint in *Sloan v. S.E.C. et al.*, 74 Civil 5729, Sloan alleged (¶9, 10) that he was a victim of discrimination because a trading suspension only prohibited brokers and dealers from buying and selling suspended securities. However, the answer filed by the S.E.C. stated that a trading suspension prohibited all persons from buying and selling those securities. Furthermore, the S.E.C. has promulgated Rule 0-8 (17 CFR 240.0-8) which states:

> "Any provision of any rule or regulation under the Act which prohibits any act, practice, or course of business by any person if the mails or any means or instrumentality of interstate commerce are used in connection therewith, shall also prohibit any such act, practice, or course of business by any broker or dealer registered pursuant to Section 15(b) of the Act, or any person acting on behalf of such a broker or dealer, irrespective of any use of the mails or by any means or instrumentality of interstate commerce."

From the language of this rule there can be no doubt that the S.E.C. believes its power to extend well beyond the limits of power of the federal government as set forth in the Constitution

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6. However, even a state could not ban the sale of CJV shares unless it could show that a compelling state interest was involved, *Bates v. Little Rock*, 361 U.S. 516, 525 (1960).

and that, in the view of the S.E.C., all trading in shares of CJV, whether interstate or intrastate, are prohibited by its orders of suspension of trading.

In response to this point, the S.E.C. asserts that the securities markets in question transcend state and often international boundries[7] (respondent's brief p. 18, n. 18). However, the fact that some sales of shares of CJV may take place across state lines does not give the S.E.C. the right to prohibit all sales of CJV shares.

According to the brief of the S.E.C., (p. 19) the power of the government to regulate trading in securities can be traced back to *Gibbons v. Ogden*, 9 Wheat 1. However, that landmark decision is of little if any help to the S.E.C. The holding in that case was that the State of New York could not regulate commerce between that state and the State of New Jersey. The holding of *Paul v. Virginia*, 75 U.S. 168 (1868), relied upon by the petitioner, was that the State of Virginia could regulate the business of insurance. The principal holding in that decision was that insurance contracts were not commerce. In that respect, the decision was modified by *United States v. South-Eastern Underwriters Association et al.* 322 U.S. 533 (1944). But Congress reacted to the latter decision by passing the McCarran-Ferguson Act (15 USC 1012(b)). See *S.E.C. v. National Securities*, 393 U.S. 453, 458 (1969). Nevertheless, *Paul v. Virginia*, was only modified, not overruled, and the part of that decision which is quoted on p. 16 of the petitioners brief is still the law of the land. Furthermore, even though insurance contracts are now considered to be commerce, the Supreme Court has ever held that securities transactions constitute commerce.

Gibbons v. Odgen, Paul v. Virginia and other decisions of a

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7. In view of the long arm jurisdiction of the federal courts under the Exchange Act, a trading suspension, if valid, makes it illegal for United States residents to buy and sell shares of CJV on the Montreal and Vancouver Stock Exchanges and makes it illegal for Canadian stock brokerage firms to accept purchase and sale orders of CJV shares from United States residents. See *S.E.C. v. United Financial Group, Inc.*, 474 F. 2d 354 (1973). Accordingly, most Canadian stock brokerage firms have established the practice of refusing to accept purchase orders for CJV shares from residents of the United States.

similar vintage all were concerned with the scope and limitations of state power. Only in this century were questions presented concerning how far Congress could go in regulating commerce. This circumstance serves to emphasize the fact that the Framers of the Constitution intended that the effect of the commerce clause would be to deprive the states of the power to regulate commerce among the several states. Under the Articles of Confederation many states had imposed regulations on imports from other states. The Federalist No. 22 expounded on the evils of this state of affairs by stating:

> "The interfering and unneighborly regulations of some states, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they become not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy. . . . Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens."

Thus, in The Federalist No. 42 the commerce clause was deemed necessary "for the harmony and proper intercourse among the states."

Clearly, the Framers of the Constitution incorporated the commerce clause in the constitution in order to restrain the power of the state. There can be no question that the Framers of the Constitution did not intend that the 16 words of the Commerce clause would be used to justify the creation of a regulatory octopus which would have such far-reaching powers as to nullify the rest of the Constitution.

The claim that the existance of the S.E.C. has the effect of nullifying the rest of the Constitution is not to be considered an exaggeration. According to an article entitled "Too Much Government by Decree!" in the May, 1975 Readers Digest,

Professor Irving Kristol of New York University recently wrote:

> "If the Environmental Protection Agency's conception of its mission is permitted to stand, it will be the single most powerful branch of government, having far greater direct control over our individual lives than Congress or the Executive or state and local governments."

However, the statutory powers of the Environmental Protection Agency are no greater than that of the S.E.C. even though the two agencies are concerned with different, although overlapping, spheres of influence. In fact, with the increasing tendency of the S.E.C. to meddle into the affairs of such major corporations as IBM Corp., Gulf Oil Corp. and AT&T to name a few, Professor Kristol may have overlooked the fact that the powers of the EPA are perhaps exceeded by the powers of the S.E.C.

Recently, the federal government has promulgated a regulation which requires that, in order to qualify for federal funds, every high school must offer sexually intergrated physical education classes. This type of federal regulation displays little regard for the Constitution. According to estimates by the Counsel of Economic Advisors, the direct cost to the government of federal regulation amounts to $14 billion per year. Two weeks ago, in a speech in Buffalo, N.Y., Secretary of the Treasury William P. Simon said:

> "Professor Tom Moore at the Hoover Institute estimates that just in the trucking and surface transportations alone, governmental regulations add about $10 billion a year to the bill paid by consumers. No one knows the precise cost of all governmental regulations, but it has been estimated by reliable sources that the total cost to consumers exceeds $100 billion a year."

Thus it can be seen that, based upon reliable estimates, if this Court agrees with all of the arguments advanced by the petitioner and puts the S.E.C. out of its misery, the ultimate saving to taxpayers and consumers will be in excess of $114 billion per year.

However, this court should not permit this fact to influence its decision making. In the words of Chief Justice Marshall "it is a

constitution we are expounding." *McCulloch v. Maryland*, 4 Wheat 316, 407. It is not for the courts to make decisions of public policy. If there were a word, phrase or clause in the Constitution which enabled the creation of an independent regulatory agency, the existence of the S.E.C. would be justified. However there is none. Clearly, the S.E.C. and the other regulatory agencies are not part of the Executive Branch of the government because if they were they would not normally have occasion to be sued by the Department of Justice. See *United States v. Interstate Commerce Comm.*, 337 U.S. 426; *United States v. ICC*, 352 U.S. 158 (1956). Furthermore, as we have seen, the S.E.C. cannot possibly be part of the judicial branch of government because the S.E.C. commissioners have not received life-time appointments. And, it is submitted, nobody could seriously argue that the S.E.C. is part of the legislative branch of government. Therefore, it is apparent that the S.E.C. is part of the so-called Fourth Branch of government, a branch which is not recognized by the Constitution. Clearly, the existance of the S.E.C. is a violation of the doctrine of separation of powers. Therefore, it is appropriate to recall the words of Mr. Justice Brandeis who stated in his dissent in *Myers v. United States*, 272 U.S. 52, 293:

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

There can be no question that the S.E.C. subjects to an autocratic rule those whom it deems to regulate. Under the "public interest" standard there is virtually no limit to the authority of the S.E.C. The New York State courts have recognized that legislative power cannot be delegated to an administrative agency unless that power is limited by a justiciable standard, *Packer Collegiate Institute v. Board of Regents*, 298 N.Y. 184, and that a decision of an administrative agency must be based upon a residuum of legally competent

evidence, *Carroll v. Knockerbocker Ice Co.*, 216 N.Y. 435.

The autocratic character of the power which the S.E.C. commissioners see themselves as having is demonstrated by their claim that they are not required to affix their signature to any documents. The S.E.C. (respondents brief p. 25, n. 25) contends that the signing of an order is a ministerial act and therefore is not required of the commissioners. However, a ministerial act is defined as a non-discretionary act involving a simple definate duty arising under conditions admitted or proved to exist and imposed by law. *Kendall v. United States*, 12 Pet 524, *Roberts v. United States ex rel. Valentine* 176 U.S. 221. For example, the appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act but one involving the exercise of judgment. *Keim v. United States*, 177 U.S. 290. The brief of the S.E.C. fails to point to any statute or rule which either empowers, enables or requires the Secretary of the Commission to sign and enter orders on behalf of the S.E.C. Clearly, this is not a mere oversight because the S.E.C. has demonstrated a willingness to promulgate rules to meet every other situation. In *Blue Chip Stamps v. Manor Drug Stores*, — — U.S. ——, 44 L. Ed. 2d. 539, 567 (1975) a passage is quoted from the remarks of Milton Freeman at a Conference on the Codification of the Federal Securities Laws. This passage, which relates how S.E.C. Rule 10b-5 became the law of the land, states:

> "We called the Commission and we got it on the calendar, and I don't remember whether we got there that morning or after lunch. We passed a piece of paper around to all of the Commissioners. All the Commissioners read the rule and tossed it on the table, indicating approval. Nobody said anything except Summer Pike who said, 'Well" he said 'we are against fraud, aren't we? That is how it happened."

This is an example how the republic is governed under the authoritarian rule of the S.E.C. Important documents are not signed; rather they are "tossed on the table" indicating approval. According to the S.E.C. it is not necessary to sign these documents, which affect the lives of so many people, because

their signing is nothing more than a "ministerial act."[8] Clearly, the age of Big Brother has arrived.

CONCLUSION

For all of the reasons set forth above, the orders of suspension of trading in Canadian Javelin Ltd. should be vacated.

Respectfully submitted,

Samuel H. Sloan
Petitioner, pro se

Dated: Lynchburg, Virginia
August 16, 1975

8. The practice of the S.E.C. seems to be that rules, when promulgated, interpretations of these rules and other releases are unsigned. However, orders are signed or initialed by some person, although not by any of the commissioners. Initial decisions by administrative law judges are signed by those judges.

Sloan v Lee -

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 30 day of July, 1975 deponent served the within Brief upon Thomas L. Taylor III
Diamond + Golomb

attonrye(s) for appellee

in this action, at 500 N. Capitol - 99 Park Ave
N.Y.C.
Washington, DC 20579

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
30 day of July, 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976